No. 86 1893

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

KELVIN W. DOUGLAS
SERGEANT, UNITED STATES ARMY,

PETITIONER

v.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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29 pp

QUESTION PRESENTED

WHETHER the Due Process Clause is violated by the government's exclusive reliance upon an inference of knowledge in a prosecution for the wrongful use of a contraband drug, despite unrebutted evidence of unknowing use, thereby relieving the government of its burden to prove a *mens rea* element beyond reasonable doubt and placing a burden upon petitioner to persuade the fact finder of his innocence.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for the Granting the Writ	
I. THE COURTS BELOW HAVE, IN DRUG ABUSE CASES, IGNORED A FUNDAMENTAL PRINCIPAL OF DUE PROCESS BY RELIEVING THE GOVERNMENT OF ITS BURDEN TO PROVE EACH ELEMENT OF THE OFFENSE AND PLACING A BURDEN OF PERSUASION UPON THE ACCUSED	4
II. THE FUNDAMENTAL PRINCIPLE OF DUE PROCESS IGNORED BY THE COURTS BELOW IS THE ONLY SUBSTANTIAL PROTECTION SUSPECTED MILITARY DRUG OFFENDERS HAVE AGAINST WHAT WOULD OTHERWISE BE AN UNBRIDLED SYSTEM OF MILITARY DISCIPLINE	10
Appendix A	1a
Appendix B	2a

TABLE OF AUTHORITIES

Cases:

Ballew v. Georgia, 435 U.S. 223 (1978)	11
Barnes v. United States, 412 U.S. 837 (1973)	7
Brown v. Glines, 444 U.S. 348 (1980)	12
Burch v. Louisiana, 441 U.S. 130 (1979)	11
Burns v. Wilson, 346 U.S. 137 (1953)	12
Courtney v. Williams, 1 M.J. 267 (CMA 1976)	12
County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979)	5, 6, 9
In re Winship, 397 U.S. 358 (1970)	5, 8, 9
Francis v. Franklin, 471 U.S. 307 (1985)	5, 9

Cases – Continued: Page

Jackson v. Virginia, 443 U.S. 307 (1979) 10
Mendrano v. Smith, 797 F.2d 1538 (10th Cir. 1986) 11
Moore v. Chesapeake & Ohio Ry. Co., 340 U.S. 573 (1951) 8
Mullaney v. Wilbur, 421 U.S. 684 (1975) 5, 8, 9, 10
National Treasury Employees Union v. Von Raab, CA 5, No. 86-3833, 41 CrL 2097, April 22, 1987 13
Nishikawa v. Dulles, 356 U.S. 129 (1958) 8
O'Callahan v. Parker, 395 U.S. 258 (1969) 10, 11, 12
Parker v. Levy, 417 U.S. 733 (1974) 12
Patterson v. New York, 432 U.S. 197 (1977) ...5, 8, 9, 10
Relford v. Commandant, 401 U.S. 355 (1971) 12
Sandstrom v. Montana, 442 U.S. 509 (1979) 9
Schlesinger v. Councilman, 420 U.S. 738 (1975) . 12
United States v. Biesak, 3 C.M.A. 714, 14 C.M.R. 132 (1954) 8
United States v. Cole, 24 M.J. 18 (CMA 1987) 11, 12
United States v. Crawford, 6 C.M.A. 517, 20 C.M.R. 233 (1955) 5
United States v. Douglas, 1 M.J. 354 (CMA 1976) 2
United States v. Douglas, 22 M.J. 891 (ACMR 1986) *aff'd* ____ M.J. ____ (CMA 1987) 1, 4, 6, 7, 9
United States v. Ezell, 6 M.J. 307 (CMA 1979) ... 12
United States v. Fears, 11 C.M.A. 584, 29 C.M.R. 400 (1960) 5
United States v. Ford, 23 M.J. 331 (CMA 1987) .. 4, 8, 9
United States v. Gregory, 21 M.J. 952 (ACMR), *aff'd* 23 M.J. 246 (CMA 1986) 11
United States v. Guilford, 8 M.J. 598 (ACMR 1979), *pet. denied* 8 M.J. 242 (CMA 1980) 11
United States v. Harper, 22 M.J. 157 (CMA 1986) 5
United States v. Harris, 5 M.J. 44 (CMA 1978) .. 11
United States v. Hawkins, 2 M.J. 23 (CMA 1976) . 2
United States v. Hessler, 7 M.J. 9 (CMA 1979) ... 11
United States v. Middleton, 10 M.J. 123 (CMA 1981) 11

Cases – Continued: Page

United States v. Murphy, 23 M.J. 310 (CMA 1987) 4
United States v. Poundstone, 22 C.M.A. 277, 46 C.M.R. 277 (1973) 11
United States v. Solorio, 21 M.J. 251 (CMA 1986), *cert. granted*, ____ U.S. ____, 106 S.Ct. 2914 (1986) 12
United States v. Tedder, ____ M.J. ____ (CMA 1987) 6
United States v. Thompson, 21 C.M.A. 526, 45 C.M.R. 300 (1972) 5
United States v. Trottier, 9 M.J. 337 (CMA 1980) 13
United States v. Unrue, 22 C.M.A. 466, 47 C.M.R. 556 (1973) 11
United States v. Ware, 1 M.J. 282 (CMA 1976) ... 2
United States v. West, 15 C.M.A. 3, 34 C.M.R. 449 (1964) 5, 8
United States v. Yoakum, 8 M.J. 763 (ACMR), *aff'd* 9 M.J. 417 (CMA 1980) 11

Constitution and Statutes

U.S. Const. amend. V 2
28 U.S.C. § 1259(3) (Supp II 1984) 1
Uniform Code of Military Justice
Article 2 3
Article 16 11
Article 112a 2, 5
Manual for Courts-Martial, United States, 1951 .....
Paragraph 138a 8
Paragraph 213a 8
Manual for Courts-Martial, United States, 1969 .....
Paragraph 138a 8
Paragraph 213b 8
Manual for Courts-Martial, United States, 1984 .....
Rule for Courts-Martial 305 11
Military Rule of Evidence 313 11
Part IV, Paragraph 37b(2) 5
Part IV, Paragraph 37c(5) 2, 5, 6, 9, 10

Other Authorities:

	Page
Army Regulation 635-200, Chapters 13 and 14 (5 July 1984) (Enlisted Ranks Personnel Update, 30 January 1987)	12
Executive Order 12564 of September 15, 1986, "Drug-Free Federal Workplace", 51 FR 180, p. 32889.	13
Newsweek, September 22, 1986, "Getting Tough"	14
Newsweek, August 11, 1986, "Trying to Say 'No' "	14
Newsweek, May 5, 1986, "Can You Pass the Job Test?"	14
Time, September 15, 1986, "America's Crusade"	14
Time, March 17, 1986, "Battling the Enemy Within"	14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner Kelvin W. Douglas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at ___ M.J. ___ (CMA 1987) (Appendix A). The opinion of the Army Court of Military Review is reported at 22 M.J. 891 (ACMR 1986) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987, affirming petitioner's conviction dated October 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Uniform Code of Military Justice provides:

> Article 112a, 10 U.S.C. § 912a (Supp II 1984): "(a) Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct.
> (b) The substances referred to in subsection (a) are the following:
>
> > (1) . . . marijuana and any compound or derivative of any such substance.

The *Manual for Courts-Martial, United States, 1984,* provides:[1]

> Paragraph 37c(5): "To be punishable under Article 112a, . . . use . . . of a controlled substance must be wrongful. . . . [U]se . . . of a controlled substance is wrongful if it is without legal justification or authorization. . . . [U]se . . . is not wrongful if such act or acts are . . . (C) without knowledge of the contraband nature of the substance. . . . [U]se . . . of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial . . . shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use . . . was wrongful.

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[1] The provisions of the Manual for Courts-Martial have the force and effect of law to the extent they are consistent with the UCMJ. *United States v. Hawkins,* 2 M.J. 23 (CMA 1976); *United States v. Douglas,* 1 M.J. 354 (CMA 1976); *United States v. Ware,* 1 M.J. 282, 285 fn 10 (CMA 1976).

STATEMENT OF THE CASE

Petitioner was tried on September 15 and 16 and October, 21, 22, and 23, 1985, at Fort Lesley J. McNair, Washington, D.C., before a special court-martial composed of officer and enlisted members. The court-martial invoked jurisdiction pursuant to Article 2, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 802 (1982). Contrary to his plea, the petitioner was convicted of one specification alleging a wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (Supp II 1984). The prosecution established that petitioner's urine had tested positive for the presence of THC[2] metabolites (Prosecution Exhibit 1). The prosecution also produced evidence tending to establish the chain of custody of the urine sample (Prosecution Exhibits 1, 2, and 3 introduced at R. 145-150, R. 159-161, and R. 164-168, respectively), and evidence tending to establish the scientific reliability of the urinalysis test itself (R. 174-189).

Petitioner presented evidence that he had unknowingly ingested marijuana contained in a chocolate cake shortly before the urinalysis test [(R. 242-246), (R. 252-257), (R. 267-273), (R. 289-293)]. This evidence included the in-court felony admission of the woman who baked the marijuana laced cake and delivered it for consumption at a party without informing anyone of its contraband contents (R. 242-246). Petitioner also presented expert testimony that oral ingestion of the type described in the defense testimony could result in a positive result in a urinalysis test at the level reported for petitioner (R. 306). Petitioner then presented extensive evidence concerning his good military character showing that wrongful use of marijuana was inconsistent with his character [(R. 320-324), (R. 327-331), (R. 332-335), (R. 336-338), and (R. 341-343)].

The government presented no evidence in rebuttal to the defense evidence concerning the circumstances of petitioner's ingestion of marijuana. Further, the government's expert witness was unable to affirmatively

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[2] THC is an abbreviation for tetrahydrocannabinol, the psychoactive ingredient in marijuana.

refute the testimony that a positive test result was possible under the facts as set out in the defense testimony (R. 366-375).

The court-martial entered findings of guilty to the charge of wrongful use of marijuana and sentenced petitioner to a bad conduct discharge, reduction to the lowest enlisted grade, and a fine of $400. On July 31, 1986, the Army Court of Military Review affirmed the findings and the sentence. *United States v. Douglas,* 22 M.J. 891 (ACMR 1986) (Appendix B).

The federal constitutional question involved has been substantially litigated at all stages of the appellate process. The issue granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE GOVERNMENT MAY EXCLUSIVELY RELY UPON AN INFERENCE OF KNOWLEDGE TO SATISFY ITS BURDEN OF PROOF ON THE ELEMENT OF WRONGFULNESS IN A PROSECUTION FOR WRONGFUL USE OF MARIJUANA WHERE THE ONLY GOVERNMENT EVIDENCE IS A POSITIVE RESULT OF A URINALYSIS TEST AND THE DEFENSE PRESENTS UNREBUTTED EVIDENCE OF INNOCENT USE.

On April 9, 1987, the Court of Military Appeals affirmed the decision of the Army Court of Military Review, relying upon its decisions in *United States v. Ford,* 23 M.J. 331 (CMA 1987) and *United States v. Murphy,* 23 M.J. 310 (CMA 1987). *United States v. Douglas,* ____ M.J. ____ (CMA 1987) (Appendix A).

REASONS FOR GRANTING REVIEW

I. THE COURTS BELOW HAVE, IN DRUG ABUSE CASES, IGNORED A FUNDAMENTAL PRINCIPAL OF DUE PROCESS BY RELIEVING THE GOVERNMENT OF ITS BURDEN TO PROVE EACH ELEMENT OF THE OFFENSE AND PLACING A BURDEN OF PERSUASION UPON THE ACCUSED.

The petitioner presents a substantial federal constitutional question dealing with the burden of proof in criminal trials. The question arises out of a disregard by the lower appellate tribunals of the decisions of this Court in *In re Winship,* 397 U.S. 358 (1970), *Mullaney v. Wilbur,* 421 U.S. 684 (1975), and *Patterson v. New York,* 432 U.S. 197 (1977), and a misunderstanding of this Court's decisions in *Francis v. Franklin,* 471 U.S. 307 (1985) and *County Court of Ulster County, New York v. Allen,* 442 U.S. 140 (1979).

Congress has made punishable by courts-martial the use of various contraband drugs, including marijuana, by members of the armed services. Article 112a, UCMJ. The offense consists of two elements. First, that the accused used a contraband drug and second, that the use was wrongful. *Manual for Courts-Martial, United States, 1984* [hereinafter *MCM, 1984*], Part IV, Paragraph 37b(2). Use of a contraband drug is wrongful if it is knowing and without justification or authorization. *MCM, 1984,* Part IV, Paragraph 37c(5). The element of wrongfulness is, in reality, a matter of *mens rea* and therefore requires that the use be knowing and intentional. *United States v. Thompson,* 21 C.M.A. 526, 45 C.M.R. 300 (1972); *United States v. West,* 15 C.M.A. 3, 34 C.M.R. 449 (1964).

The Manual for Courts-Martial establishes a permissive inference for the benefit of the government in its prosecution of drug offenses. If the government can establish use of marijuana, the trier of fact can infer that the use was wrongful in the absence of evidence to the contrary. *MCM, 1984,* Part IV, Paragraph 37c(5); *See also United States v. Harper,* 22 M.J. 157 (CMA 1986); *United States v. Fears,* 11 C.M.A. 584, 29 C.M.R. 400 (1960); *United States v. Crawford,* 6 C.M.A. 517, 20 C.M.R. 233 (1955). Therefore, in a prosecution for wrongful drug use based upon a urinalysis test, if the accused offers no explanation for the presence of the metabolite in his system, the court-martial may infer that the use was knowing and without justification or authorization.

This permissive inference places upon the accused a burden of going forward with evidence that the use was not wrongful. *MCM, 1984,* Part IV, Paragraph 37c(5); *Harper,* 22

M.J. at 162. However, once this burden of production is met, the burden of proof beyond reasonable doubt that the use was wrongful is upon the government.

> . . . [U]se of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with respect to any such exception [such as lack of knowledge] in any court-martial . . . shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented then the burden of proof is upon the United States to establish that the use . . . was wrongful.

MCM, 1984, Part IV, Paragraph 37c(5).

In the instant case, there was sufficient evidence presented for a court to find that use of marijuana had been proven beyond reasonable doubt. Had there been no further evidence, the government would have been allowed to exclusively rely upon the permissive inference to prove the element of wrongfulness.[3] The petitioner, however, presented substantial evidence that the use of marijuana had been unknowing. The military judge instructed the court-martial that the issue of innocent use had been raised by the defense evidence (R. 412). The government presented no direct evidence to rebut the evidence presented by the defense which tended to establish that petitioner's ingestion of marijuana had been innocent. The government relied, rather, upon an attack upon the credibility of the petitioner. *Douglas*, 22 M.J. at 894.

The Army Court of Military Review in affirming the petitioner's conviction, was unable to glean from the record any facts which tended to disprove petitioner's explanation of how the marijuana metabolites came to be in his urine. The

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[3] This assumes that the inference of wrongfulness set out in the Manual satisfies the requirements of *Ulster County*, 442 U.S. 140. This assumption may not be well grounded. A challenge to the inference of wrongfulness is being made before this Court in the case of *United States v. Tedder*, ____ M.J. ____ (CMA 1987), by means of a Petition for Writ of Certiorari. Should this Court conclude that the inference in the Manual does not satisfy the requirements of *Ulster County*, that decision would be controlling.

Court extracted only argumentative attacks upon credibility made by the prosecution during cross-examination of petitioner. *Id.* No admissions or retractions were made by any of the defense witnesses which tended to rebut the petitioner's explanation of innocent use. The Court of Review added that it was "persuaded that [petitioner's] introduction of unrebutted evidence opposed to the inference of wrongfulness should not in and of itself foreclose consideration of the inference by the factfinder." *Id.* The Court of Review then imparts a rule that the accused in such a case must persuade the finder of fact that the inference should not apply. *Id.* at 894-895.[4]

The Army Court of Military Review fails to reconcile its decision with the provisions of the Manual limiting the applicability of the inference of wrongfulness, and relies upon this Court's language in *Barnes v. United States,* 412 U.S. 837, 845 fn 9 (1973), that a jury is free to disbelieve the explantion of the accused. *Douglas,* 22 M.J. at 894, fn 4. The court fails, however, to see the distinction between the present case and *Barnes.* In the latter case the only evidence presented by the petitioner was his own testimony, while here the defense evidence included the in-court felony admission of the person who surreptitiously caused petitioner to ingest marijuana. Further, the Court of Military Review does not discuss the distinction that in the case *sub judice,* unlike *Barnes,* the inference is the product of the Manual provision which, by its own terms, limits its application only to those cases in which there is *no* evidence to the contrary.

The Court of Military Review placed its imprimatur upon the government substituting an attack upon the credibility of

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[4] Senior Judge Raby in his concurrence makes it clear that the court placed the burden of persuasion on the petitioner to establish that his use was not wrongful.

"We admonish all future offenders that a defense of innocent or unknowing use of marijuana will not overcome a permissible inference of wrongful use unless and until such defense is found sufficiently credible to be contrary to and to overcome such inference. Any other conclusion than that presented in the majority opinion would provide future offenders a windfall from the introduction of perjured or otherwise absurd testimony." Douglas, 22 M.J. at 895 (Raby, S.J., concurring).

defense witnesses, who testified that appellant's ingestion of marijuana had been innocent, in lieu of presenting evidence on the element of wrongfulness. This is impermissible. Disbelief of a particular witness does not permit the trier of fact to infer that the opposite of what the witness has testified is true. *Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958); *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 576 (1951).

The Court of Military Appeals in its decision in *Ford*, 23 M.J. 331, first concludes that the Manual provisions dealing with the inference of wrongfulness do not preclude a conviction based upon a urinalysis result and the inference of wrongfulness in the face of evidence to the contrary. *Id.* at 333-335. The court then establishes a test whereby a conviction based upon the inference of wrongfulness may be affirmed "where the defense evidence contrary to the inference may be reasonably disbelieved by the factfinder." *Id.* at 334.

The Court of Military Appeals determined that the Manual provision dealing with the inference of wrongfulness does not mean what it says. The court noted that both paragraph 213a, *Manual for Courts-Martial, United States, 1951,* and the original version of paragraph 213b, *Manual for Courts-Martial, United States, 1969,* precursors to the current provision, created a presumption of wrongfulness that existed unless the contrary appeared. The court then noted that the inference or presumption under these provisions could still be drawn by the finder of fact if the contrary evidence could "reasonably be disbelieved".[5] The court then states it is unable to justify a change in this rule based upon the change in the language in the current Manual. *Ford*, 23 M.J. at 333-335. The Court of Military Appeals failed to recognize that the change in the language occurred after this Court's decisions in *Winship*, 397 U.S. 358 (1970), *Mullaney*, 421 U.S. 684 (1975), and *Patterson*, 432 U.S. 197 (1977), and doubtless was a recognition on the part of the drafters of the Manual that old military precedent was in conflict with this Court's notions of due process.

[5] The court in support of this proposition cites Paragraph 138a, MCM, 1951; Paragraph 138a, MCM, 1969; *United States v. West*, 15 C.M.A. at 7, 34 C.M.R. at 435 (1964); and *United States v. Biesak*, 3 C.M.A. 714, 722-724, 14 C.M.R. 132, 140-142 (1954).

The President, in Paragraph 37c(5), *MCM, 1984*, has created a procedure which comports with the Court's decisions concerning the use of inferences and due process. The Manual provision does nothing more than place upon the accused the burden of going forward with evidence that his case fits within one of the exceptions to the usual case where use of a contraband drug is wrongful. This burden of production is reasonable in that the government should not be required to disprove every conceivable exception to wrongfulness. The Manual provision, however, quite plainly states that wrongfulness may only be inferred in the absence of evidence to the contrary and that once an accused meets his burden of production, the burden of production and proof beyond a reasonable doubt on the element of wrongfulness rests with the government. The scheme set up by the President does not violate the principles of the Court set out in *Winship*, *Mullaney*, or *Patterson*.

The Army Court of Military Review and the Court of Military Appeals have, in the area of drug abuse, converted the traditional accusatorial system of justice into an inquisitorial system in which the accused must persuade the trier of fact of his innocence. By placing upon the accused a requirement to present an explanation of the presence of the drug in his system which "the trier of fact does not disbelieve", *Douglas*, 22 M.J. at 895, or could not "reasonably be disbelieved by the factfinder", *Ford*, 23 M.J. 334, the lower courts have placed upon the accused a burden of proving his innocence.[6]

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every [element] necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. While the use of permissive inferences may pass constitutional muster in criminal trials, *Ulster County, Sandstrom v. Montana*, 442 U.S. 509 (1979), *Francis v. Franklin*, the use of these inferences cannot relieve the government of its burden to

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[6] Whether that burden of proof is beyond a reasonable doubt, by a preponderance, or some other standard is immaterial; under any standard it is a violation of the Due Process clause.

prove each element of the crime alleged beyond reasonable doubt. "*Mullaney* surely held that [the government] must prove every ingredient of an offense beyond reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *Patterson*, 432 U.S. at 215.

It is this requirement that the courts below have ignored. They have created a standard whereby the government is relieved of its burden to prove beyond reasonable doubt that the accused used contraband drugs knowingly and have substituted in the place of this requirement a burden upon the accused that he persuade the trier of fact that his use was unknowing. This requirement deprived petitioner of due process.

Since under the provisions of *MCM, 1984*, Paragraph 37c(5), the government cannot exclusively rely upon the inference of wrongfulness to satisfy its burden of proof on that element because petitioner presented substantial evidence to the contrary, there exists no evidence on the element of wrongfulness. The government failed in meeting its burden to prove wrongfulness beyond reasonable doubt.[7] The courts below erred by failing to put the government to this Due Process clause burden.

II. THE FUNDAMENTAL PRINCIPLE OF DUE PROCESS IGNORED BY THE COURTS BELOW IS THE ONLY SUBSTANTIAL PROTECTION SUSPECTED MILITARY DRUG OFFENDERS HAVE AGAINST WHAT WOULD OTHERWISE BE AN UNBRIDLED SYSTEM OF MILITARY DISCIPINE.

As the Court noted in *O'Callahan v. Parker*, 395 U.S. 258 (1969), trial by court-martial is very different than trial before a civilian court. A court-martial is not an independent instrument of justice. It is a specialized part of the military system of preserving discipline. *Id.* at 265. As noted by the Court, an accused in a court-martial is denied the benefit of

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[7] If the government is denied exclusive reliance upon an inference of wrongfulness, there was presented insufficient evidence for a reasonable finder of fact to be persuaded that the government proved that appellant knowingly used marijuana. Jackson v. Virginia, 443 U.S. 307 (1979).

indictment by grand jury, *id.* at 262, trial by jury,[8] *id.*, conviction only upon a unanimous verdict, *id.* at 263, and a trial presided over by a "judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition. . . ." *Id.* at 264. The Court also noted that courts-martial operate under the pervasive cloud of command control. *Id.* In addition to these concerns, persons tried by courts-martial are denied the full protection of the rights enjoyed by civilians to be secure against unreasonable searches and seizures[9] and the right to release from pretrial confinement on bail.[10]

All of these deprivations of rights guaranteed to citizens have been justified in courts-martial because of the unique

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[8] A military accused is also denied the right to a trial before a body consisting of a sufficient number of persons to insure accuracy. Unlike juries, courts-martial may convict persons of felony crimes upon the nonunanimous verdict of five persons in trials by general courts-martial and of three persons in trials by special courts-martial. Article 16, UCMJ. *Compare,* Ballew v. Georgia, 435 U.S. 223 (1978) and Burch v. Louisiana, 441 U.S. 130 (1979).

The requirement of *Ballew* and *Burch* has been held not to apply to courts-martial. United States v. Guilford, 8 M.J. 598 (ACMR 1979) *pet. denied* 8 M.J. 242 (CMA 1980); United States v. Yoakum, 8 M.J. 763 (ACMR), *aff'd* 9 M.J. 417 (CMA 1980); Mendrano v. Smith, *797 F.2d 1538 (10th Cir. 1986).*

[9] *See e.g.,* United States v. Middleton, 10 M.J. 123 (CMA 1981); United States v. Hessler, 7 M.J. 9 (CMA 1979); United States v. Harris, 5 M.J. 44 (CMA 1978); United States v. Unrue, 22 C.M.A. 466, 47 C.M.R. 556 (1973); United States v. Poundstone, 22 C.M.A. 277, 46 C.M.R. 277 (1973).

The prosecution in the instant case arose out of an involuntary urinalysis test conducted pursuant to the government's authority under Military Rule of Evidence 313, MCM, 1984, to conduct "inspections" and thus gather evidence of crime without probable cause or authorization.

[10] RCM 305, MCM, 1984; *see* United States v. Gregory, 21 M.J. 952, 959 fn 3 (ACMR) *aff'd* 23 M.J. 246 (CMA 1986).

See also United States v. Cole, 24 M.J. 18, 27 (CMA 1987) (Everett, C.J., dissenting). Chief Judge Everett notes that an accused before a court-martial is provided less due process than a person tried before a civilian court. In particular the Chief Judge notes that accuseds before courts-martial are denied indictment by grand jury, *id.* at 28, the right to be released on bail, *id.* at 30, fn 6, and most significantly, the right to a trial by jury, *id.* at 30.

necessities of the military. *See O'Callahan*, 395 U.S. at 265; *Parker v. Levy*, 417 U.S. 733, 743 (1974); *Brown v. Glines*, 444 U.S. 348 (1980). There is, however, no military necessity which requires that a military accused, even a suspected drug user, be denied that fundamental due process protection of placing the burden of proof of guilt upon the government.[11] Not even the military's compelling need to eliminate drug users from the service justifies an erosion of due process in military criminal prosecutions for drug use.[12]

The ultimate protection of the individual service member when the full weight of the government is thrown into a prosecution by court-martial is the requirement that fundamental due process be satisfied. It is, in the final analysis, the presumption of innocence and the placing of the burden of proof upon the government that prevents courts-martial from dispensing drumhead justice. These concepts provide the last bulwark against the injustice which would result were the military system of discipline left unbridled.[13]

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[11] "When a party urges that a different rule obtains in the military than in the civilian sector, the burden is upon that party to show the need for such a variation." United States v. Ezell, 6 M.J. 307, 313 (CMA 1979) *citing* Courtney v. Williams, 1 M.J. 267 (CMA 1976).

[12] "[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." Burns v. Wilson, 346 U.S. 137, 142-143 (1953).

The Secretary of the Army and the other Service Secretaries have promulgated regulations which authorize the administrative discharge of drug users even in those cases where the government cannot prove the element of wrongfulness beyond a reasonable doubt. *E.g.* Army Regulation 635-200, Chapters 13 and 14 (5 July 1984) (Enlisted Ranks Personnel Update, 30 January 1987).

[13] The necessity of these protections become significantly more important when the recent expansion of court-martial jurisdiction is considered. Since this Court's decisions of *O'Callahan*, Relford v. Commandant, 401 U.S. 355 (1971), and Schlesinger v. Councilman, 420 U.S. 738 (1975), the bounds of court-martial jurisdiction have substantially grown. *See e.g.* United States v. Solorio, 21 M.J. 251 (CMA 1986), *cert. granted*, ___ U.S. ___, 106 S.Ct. 2914 (1986); United States v. Cole, 24 M.J. 18 (CMA 1987).

The Army Court of Military Review and the Court of Military Appeals have, in the area of prosecution for drug offenses, thrown down that last bulwark. The military appellate courts have now denied military members accused of drug offenses the most basic protection against the dangers of an unbridled system of discipline.[14] The traditional accusatorial system which American citizens enjoy is transformed in military prosecutions for drug offenses into an inquisitorial system in which the accused must persuade the court-martial of his innocence. In a prosecution for a drug offense in which conviction, possible confinement, and life long stigmatization by a punitive discharge is pursued without the protection of grand jury indictment, without trial by a jury of peers, without the benefits of trial before an objective and independent judge, lacking the full protection of the fourth amendment, and with the ever present specter of unlawful command control, the accused is now required to persuade the court-martial of his innocence. Such an affront to our established sense of fundamental fairness and due process should not be allowed to stand.

CONCLUSION

For the foregoing reasons, including the importance of the constitutional issues involved, the writ of certiorari should issue. The question presented is substantial and of great public significance.[15] It is timely in light of ever-increasing

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If, as *Solorio* suggests, court-martial jurisdiction is limited only by the imagination of prosecutors in describing a service connection, it is all the more essential that minimal due process requirements be guaranteed in all courts-martial.

[14] This is especially significant given the fact that court-martial jurisdiction over drug offenses is essentially all-encompassing. United States v. Trottier, 9 M.J. 337 (CMA 1980).

[15] While prosecution for drug offenses based upon urinalysis is currently a phenomenon limited to the military, the growing interest in urinalysis testing suggests that the civilian sector is fertile ground for the transplanting of this idea. *See* National Treasury Employees Union v. Von Raab, CA 5, No. 86-3833, 41 CrL 2097, April 22, 1987; Executive Order 12564 of September 15, 1986, "Drug-Free Federal Workplace", 51 FR 180, p. 32889;

public concern regarding drug use, the implementation of procedures to eliminate drug use, and the due process concerns such procedures have engendered. The Court of Military Appeals, in particular, has established a rule which deprives accused persons in a substantial portion of federal criminal jurisprudence of due process of law.

Respectfully submitted,

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Newsweek, September 22, 1986, "Getting Tough" (Urinalysis testing in schools); Time, September 15, "America's Crusade"; Newsweek, August 11, 1986, "Trying to Say 'No' " (Points to the military as precedent for urinalysis testing); Newsweek, May 5, 1986, "Can You Pass The Job Test?"; Time, March 17, 1986, "Battling the Enemy Within". For instance, nothing prevents a civilian private employer from providing to a prosecutor evidence of crime the employer obtained by testing his employee's urine.

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 55738/AR
SPCM 22028

UNITED STATES, APPELLEE

v.

KELVIN W. DOUGLAS, SERGEANT
U.S. ARMY, APPELLANT.

April 9, 1987

ORDER

On consideration of the granted issue (23 M.J. 399) in light of *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987), and *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987), it is, by the Court, this 9th day of April, 1987,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

UNITED STATES ARMY
COURT OF MILITARY REVIEW

SPCM 22028

UNITED STATES, APPELLEE

v.

SERGEANT KELVIN W. DOUGLAS, SSN 263-45-6895,
UNITED STATES ARMY, APPELLANT.

JULY 31, 1986

Before RABY, CARMICHAEL, and ROBBLEE, Appellate Military Judges

For Appellant: Captain Floyd T. Curry (argued); Lieutenant Colonel Paul J. Luedtke, Major Dale K. Marvin (on brief).

For Appellee: Captain Susan E. Fine (argued); Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Byron J. Braun (on brief).

OPINION OF THE COURT

ROBBLEE, Judge:

Appellant was tried by a special court-martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of wrongful use of marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a (1982 and Supp. II 1984). Appellant was sentenced to a bad conduct discharge, a fine of $400.00, and reduction to the grade of Private E-1. The convening authority approved the sentence as adjudged.

Appellant contends, *inter alia*,[1] that the evidence is insufficient as a matter of law on the grounds that (a) the permissive inference of wrongfulness[2] is limited to circumstances where evidence of lawful use has not been introduced and (b) the government failed to disprove the special defense of ignorance or mistake of fact raised at trial incident to appellant's claim of innocent use. Additionally, in oral argument before this court, appellant urges that he was deprived of the presumption of innocence because, at trial, he was required to go forward with evidence establishing that his use of marijuana was lawful in order to rebut the permissive inference of wrongful use. Only appellant's assertions regarding sufficiency of the evidence merit discussion.

To prove its case on the charge, the government introduced duly authenticated records indicating that appellant had tested positive for the presence of tetrahydrocannabinol (THC), a marijuana metabolite. The chain of custody regarding the urine sample and the scientific reliability of the urinalysis test performed were established. Further, the expert witness for the government offered the opinion that the metabolite level in the sample was caused by other than passive inhalation.

The defense challenged the reliability of the test results, asserted that appellant had unknowingly ingested marijuana by eating several pieces of cake into which marijuana had been baked, and offered evidence of appellant's good character. The defense expert opined that orally ingested marijuana could result in a positive urinalysis result at the level reported in appellant's case.

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[1] Appellant, through counsel, asserts that the convening authority erred by approving a sentence including a bad conduct discharge where the record was nonverbatim and that his sentence, insofar as it included a fine, was inappropriate. Appellant also personally asserts error in the nature of prosecutorial misconduct, unlawful command influence, and inappropriately severe sentencing.

[2] Manual for Courts-Martial, United States, 1984, part IV para. 37c(5); United States v. Harper, 22 M.J. 157, 162 (CMA 1986) ("The inference of wrongfulness is a permissive inference or presumption, not a mandatory inference or presumption.")

The government presented no direct evidence to disprove appellant's claim of innocent use. Government cross-examination did, however, vigorously attack the credibility of the defense witnesses, including that of appellant. Cross-examination of appellant revealed, for example, that appellant had not considered his positive urinalysis as being incident to the ingestion of marijuana-laced cake until his defense counsel told him that mere passive inhalation could not adequately explain it; that at the party at which appellant had eaten such cake, a party attended by 35-40 people, many of whom were smoking marijuana, appellant, although testifying that he did not use marijuana but at the time believed that passive inhalation could result in a positive urinalysis, nonetheless stated that he was "unconcerned" about being present where marijuana was being used; and that while the alcohol which appellant drank the night of the party and on the day after the party dimmed his recollection of how much he drank on those two days, it did not obscure his ability to recall the characteristics of the cake in detail, the specific number of pieces of the cake which he had eaten on both days, and that the cake did not appear to contain any substance out of the ordinary.

The military judge instructed the members of the court that they could infer that appellant's use of marijuana was wrongful absent evidence ~~to the~~ contrary; that the inference was permissive, specifically, that "[t]he drawing of this inference [was] not required"; that the use of marijuana must be knowing; that the defense of innocent use and, by analogy, the defense of ignorance or mistake of fact had raised by appellant's claim that he had eaten portions of a cake laced with mariujana; that the court could not find appellant guilty if it had reasonable doubt that appellant knew of the presence of marijuana in the cake "no matter how unreasonable his lack of knowledge [might] have been"; that evidence of appellant's good military character might raise a reasonable doubt regarding his guilt; that the burden of proof to establish the guilt of the accused beyond a reasonable doubt was on the government; and that "[t]he burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the defense."

In our view, the question of whether the use of an illegal drug was wrongful is, in the last analysis, a question of fact. Inferences are evidentary devices fundamental to factfinding, *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979) and not violative of due process if there is a rational connection between the evidentiary and ultimate facts found.[3] *Id.* Such a connection exists if the ultimate fact of wrongfulness is more likely than not to be true once the fact of use has been proven. *See Ulster County Court v. Allen*, 442 U.S. at 165. We are persuaded that appellant's introduction of unrebutted evidence opposed to the inference of wrongfulness should not in and of itself foreclose consideration of the inference by the factfinder.[4] To do so would impermissibly frustrate the capacity of courts-martial to find ultimate facts and would disregard military precedent indicating that a properly raised inference or presumption should survive until the factfinder extinguishes it for lack of credibility. *See United States v. West*, 34 CMR 449, 453 (CMA 1964) ("Possession is, of course, presemed to be unlawful in the absence of an explanation thereof satisfactory to the court members"); *United States v. Biesak*, 14 CMR 132, 142 (CMA 1954) ("[A] presumption disappears only upon the presentation of evidence that the trier of fact does not disbelieve."). Accordingly, based on the circumstances of this case, we find that the military judge properly instructed the court members that they could infer wrongful use absent evidence to the contrary.

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[3] Constitutional validity under the Due Process Clause depends "on the strength of connection between the [evidentiary facts] and [the ultimate] facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Ulster County Court*, 442 U.S. at 156.

[4] "Of course, the mere fact that there is some evidence tending to explain a defendant's [use of marijuana] consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory.' (citation omitted). The jury is not bound to accept the correctness of the inference." Barnes v. United States, 412 U.S. 843, 845 n.9 (1972).

We also reject appellant's assignment of error based on ignorance or mistake of fact and that urged upon us in oral argument with respect to the burden of proof having been shifted. In this regard, the Supreme Court had indicated that

> [b]ecause [a] permissive [inference] leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

Ulster County Court v. Allen, 442 U.S. at 157. *Accord, United States v. Harper,* 22 M.J. 157, 162 (CMA 1986). Inasmuch as there is a recognized rational connection between the use of illegal drugs and wrongfulness in the military, *United States v. Harper,* 22 M.J. at 162 and cases cited therein, it was not impermissible for the govenment, in the instant circumstances, to rely on the permissive inference of wrongful use, in addition to the related evidence on which it was based, to disprove the defense of ignorance or mistake of fact. Moreover, since the Supreme Court has approved the practice of requiring an accused to show why a permissive inference should not be applied against him as above, *Ulster County Court v. Allen,* 442 U.S. at 157; *United States v. Harper,* 22 M.J. at 162, we find no impropriety in requiring appellant to do so where, as here, the court was properly instructed on both the inference and the burden of proof. Consequently, we further find no infringement upon the presumption of innocence to which appellant was entitled. Thus, we conclude that the permissive inference of wrongfulness was properly before the court and the evidence of record, to include the inference of wrongfulness, was sufficient to support a finding of wrongful use beyond a reasonable doubt.

We have considered the issues personally raised by the appellant and find them to be without merit.

The findings of guilty and the sentences are affirmed.

Judge CARMICHAEL concurs.

RABY, Senior Judge, concurring:

I concur with my brother judge's opinion.

We admonish all future offenders that a defense of innocent or unknowing use of marijuana will not overcome a permissible inference of wrongful use unless and until such defense is found sufficiently credible to be contrary to and to overcome such inference. Any other conclusion than that presented in the majority opinion would provide future offenders a windfall from the introduction of perjured or otherwise absurd testimony.

FOR THE COURT,

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

U.S. GOVERNMENT PRINTING OFFICE: 1987—179-740/42012